90-681

No.____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

BARBARA HAFER,

Petitioner

v.

JAMES C. MELO, JR. AND CARL GURLEY, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Is the Auditor General of Pennsylvania, acting within her official capacity in connection with the discharge of employees, not a "person" under the Civil Rights Act, 42 U.S.C. §1983, and therefore not subject to civil damage actions instituted under that statute on behalf of former employees of the Pennsylvania Department of the Auditor General arising out of the Auditor General's termination of their employments?

2. Is not the Auditor General of Pennsylvania, acting within her official capacity in connection with the discharge of employees, entitled to the absolute immunity of the Eleventh Amendment to the Constitution of the United States from civil damage actions in the federal courts instituted on behalf of former employees of the Pennsylvania Department of Auditor General arising out of the Auditor General's termination of their employments?

LIST OF PARTIES

The proceedings in the United States Court of Appeals for the Third Circuit involved two separate appeals from a single order of the United States District Court for the Eastern District of Pennsylvania which were docketed in the Court of Appeals at 89-1924 and 89-1925. The parties herein who participated in the appeal at 89-1924 included petitioner Barbara Hafer and respondents James C. Melo, Jr., Louise Jurik, Donald Ruggerio, Karol Danowitz, James Dicosimo, Lucille Russell, Walter W. Speelman and John Weikel (Melo respondents). The parties to the appeal at 89-1925 were petitioner Barbara Hafer and respondents Carl Gurley, W. Gerard Best, Michael Brennan, Margaret Casper, Elizabeth Buchmiller, Daniel Clemson, Mary Fager and George A. Franklin, Jr. (Gurley respondents).

James J. West, United States Attorney for the Middle District of Pennsylvania, was a co-appellee with petitioner in the appeal at No. 89-1924. The questions presented herein by the petitioner do not relate to the claims asserted against Mr. West nor to his defenses thereto and James J. West has not been named as a party herein.

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OCTOBER TERM, 1990

BARBARA HAFER,

Petitioner

v.

JAMES C. MELO, JR. AND CARL GURLEY, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Barbara Hafer, Auditor General of the Commonwealth of Pennsylvania, respectfully requests that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit, entered in the above captioned proceeding on August 21, 1990.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit has been reported at 912 F.2d 628, and is reprinted in the Appendix hereto at p. A-1, *infra*. The Memorandum Opinion of the United States District Court for the Eastern District of Pennsylvania has not been reported. It is reprinted in the Appendix hereto, p. A-36, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, vacating the order dated September 28, 1989, of the United States District Court for the Eastern District of Pennsylvania granting summary judgment in favor of petitioner was entered on August 21, 1990. Petitioner's timely petition to the Court of Appeals for a rehearing before the entire court in banc was dismissed on September 21, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Constitution of the United States, 11th Amendment.

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

42 U.S.C. §1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The proceedings in the Court of Appeals arose out of two sets of actions (consisting of eleven separate cases) instituted in the United States District Court for the Eastern Di[illegible] of

Pennsylvania by sixteen former employees of the Department of the Auditor General of the Commonwealth of Pennsylvania (Department), alleging violations of their civil rights as a result of their having been discharged by petitioner upon her assuming the office of Auditor General in January 1989. Jurisdiction in all of the actions was based on 42 U.S.C. §§1983, 1988 and 28 U.S.C. §1343.

Eight of the lawsuits, consolidated in the District Court under the caption *Melo, et al. v. Hafer and West*, involve claims by eight individuals whose employments were terminated by petitioner because of their implication in a job-selling scheme uncovered by the United States Attorney for the Middle District, James J. West ("West"). The Melo respondents have asserted claims against Hafer and West under 42 U.S.C. §1983 for deprivation of the rights of due process and free speech and a conspiracy to deprive them of these rights, and separate state law claims against West alone. The only relief sought by the Melo respondents is monetary; none of the Melo respondents sought to be reinstated in their former positions.

The second group of actions involve an additional eight individuals who were terminated as part of a management overhaul of the Department. These actions were also consolidated in the District Court under the caption *Gurley, et al. v. Hafer*. The Gurley respondents allege claims against petitioner only for deprivation of due process and freedom of speech.

Two of the Gurley respondents seek only damages. Six of the Gurley respondents, who joined in one complaint, also request reinstatement to their former positions. Their complaint expressly alleges that they claim reinstatement relief from petitioner in her "official capacity" and damages from petitioner in her "personal capacity".

Petitioner answered the complaints, raising a number of legal defenses, including in particular the defense that the actions were barred by the Eleventh Amendment to the United States Constitution ("Eleventh Amendment"). These defenses were for the most part applicable to both groups of actions and

were presented to the District Court by way of a consolidated Motion for Summary Judgment.[1]

The District Court entered an Order (A-35) and Memorandum Opinion (A-36), granting petitioner's Motion for Summary Judgment and dismissing both the Melo and Gurley actions.[2] The principal basis for the District Court's opinion was that petitioner's actions in discharging the respondents were effected in her *official* capacity as Auditor General of Pennsylvania and that she was not a "person" subject to the provisions of 42 U.S.C. §1983, relying on the recent opinion of this Court in *Will v. Michigan Dept. of State Police,* 109 S.Ct. 2304 (1989) (A-37-A-40).[3]

Separate appeals were taken from the District Court's Order by the Melo respondents and the Gurley respondents, which appeals were consolidated for argument before the Court of Appeals. The appeals were argued before a panel consisting of Judges Sloviter, Becker and Stapleton on March 16, 1990. On August 21, 1990, the Court of Appeals filed an Opinion (A-1) vacating the order of the District Court dismissing the claims against petitioner.[4]

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1. In the Melo action, West also filed a Motion To Dismiss the Complaint or in the Alternative for Summary Judgment and the United States of America filed a motion to be substituted in place of West as to the state law counts.

2. The Order dismissing the Melo action was applicable to both petitioner and West and the District Court denied West's Motion to Dismiss on the grounds of mootness. The District Court did, however, grant the motion of the United States to be substituted as defendant with respect to the state law counts of the Melo complaint and dismissed those counts on the ground that West's conduct in connection with these counts was certified by the United States to have been within the scope of his employment necessitating substitution, 28 U.S.C. §2679(b)(1), and that the United States had not waived its defense of sovereign immunity with respect to the state claims asserted therein, 28 U.S.C. §2680(h).

3. Although petitioner submitted an extensive appendix of exhibits addressed to the merits of respondents' substantive claims, the District Court, in view of its decision that 42 U.S.C. §1983 was inapplicable, did not make any determination as to these issues.

4. The Court further vacated the District Court's dismissal of the state law claims as to West and remanded for evaluation by the District Court of the United States' certification that West's conduct was within the scope of his employment. The dismissal of the civil rights action against West was affirmed, however, on the ground that the civil rights conspiracy alleged by the Melo employees, which occurred prior to petitioner being elected Auditor General of Pennsylvania, was insufficient to impose liability against West, a non-state actor, under 42 U.S.C. §1983.

The principal basis for the Court's reversal of the District Court's grant of summary judgment in favor of petitioner as to *all* of the respondents is that one of the complaints, joined in by *only six* of the eight Gurley respondents, expressly asserted claims for monetary damages against petitioner in her "personal capacity" and that state officials *sued* in their personal capacities are subject to liability for damages[5] under 42 U.S.C. §1983 and are not entitled to the immunity afforded by the Eleventh Amendment. In so holding, the Court of Appeals has rendered a decision as to the scope and intent of these federal laws which is contrary to the express interpretation placed on them by this Court in *Will v. Michigan Dept. of State Police, supra,* which is in conflict with decisions of the United States Courts of Appeal for the Sixth and Seventh Circuits, and which presents an important issue regarding liability of state officers under federal law.

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5. The Court also held that the District Court erred in dismissing the combined complaint of the six Gurley respondents who also sought reinstatement on the ground that state officers may be sued under 42 U.S.C. §1983 in their official capacities for prospective relief. Because of the obvious inconsistency involved in asserting claims against a state officer in both capacities, "official" and "personal", the six Gurley respondents seeking reimbursement have not emphasized the differences in their legal position from that of the other respondents, but have joined in the respondents' principal argument that their action was against Hafer in her personal, not official, capacity.

REASONS FOR GRANTING A HEARING

I. The Decision of the Court of Appeals That Petitioner Is Subject to Liability for Damages Under 42 U.S.C. §1983 for Acts Taken in Her Official Capacity Is Directly Contrary to the Decision of this Court in Will v. Michigan Dept. of State Police and Is in Conflict With Decisions of Other United States Courts of Appeal.

It is undisputed that, absent waiver by the State or congressional abrogation, the Eleventh Amendment bars a damage action against a State in federal court. *Kentucky v. Graham*, 473 U.S. 159, 169, 105 S.Ct. 3099, 3107 (1985). The Amendment also bars damage suits against a state official in his or her official capacity because "a judgment against a public servant in his official capacity imposes liability on the entity that he represents." *Id.* quoting *Brandon v. Holt*, 469 U.S. 464, 471, 105 S.Ct. 873, 878 (1985). Moreover, this Court, in a recent decision, has further held that a State or a state official, *acting* in that person's official capacity, cannot be sued in any court for damages under 42 U.S.C. §1983, because they are not "persons" subject to liability under the statute. *Will v. Michigan Dept. of State Police, supra.*[6]

The Court of Appeals narrowly construed these constitutional and statutory restrictions upon civil rights damage actions as barring suits against a state official *only* if the plaintiff expressly alleges that the official is being sued in his or her "official capacity." According to the Court of Appeals, a civil rights damage action may be maintained against a state official where the plaintiff asserts, either in the complaint or otherwise, that the official is being sued in his "personal capacity," *even though the conduct giving rise to the action was performed, and could only be performed, in the individual's official capacity.*

6. A state official may, however, be subject to liability for damages for acts committed in his personal capacity, Kentucky v. Graham, 473 U.S. 159, 165, 105 S.Ct. 3099, 3105 (1985), and is subject to an action against him in his official capacity to secure prospective relief from alleged violation of rights protected by federal law, *id.*, 473 U.S. at 167 n. 14, 105 S.Ct. at 3106 n. 14; Will v. Michigan Dept. of State Police, 109 S.Ct. 2304, 2311-12 n. 10 (1989).

This restrictive interpretation of the protection afforded to state officers under our constitutional dichotomy of government sets forth a standard of State liability which is diametrically opposed to the express language in this Court's most recent discussion of this issue in *Will*.

In *Will*, a state employee brought an action under 42 U.S.C. §1983 in the Michigan state courts against the Michigan State Department of State Police and its director, alleging that he had been denied a promotion for an improper reason in violation of his civil rights. The Eleventh Amendment does not bar actions instituted in the state courts and at the time there was a conflict in the federal and state courts as to susceptibility of States and state officers to a damage action under 42 U.S.C. §1983 in the state courts. The Michigan Supreme Court held that neither the State, acting through its Department of Police, nor the Director of State Police, acting in his official capacity, were "persons" under §1983, and they were therefore not subject to liability for damages under that statute in the state courts.

That decision was affirmed by this Court as to both the State and the Director of State Police. In extending its ruling to the Director, this Court stated as follows (109 S.Ct. at 2311-12):

> "Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. . . . . As such, it is no different from a suit against the State itself. . . . We see no reason to adopt a different rule in the present context, *particularly when such a rule would allow petitioner to circumvent congressional intent by a mere pleading device.*
>
> "We hold that neither a State nor its officials *acting in their official capacities* are 'persons' under §1983. This judgment of the Michigan Supreme Court is affirmed." (Citations and footnotes omitted; emphasis added.)

It is obvious that this determination is equally applicable to bar a damage suit against a state official in the federal courts as well as in the state courts. In concluding that 42 U.S.C. §1983

does not authorize actions against States in state courts, the Court was largely influenced by the limitations upon such actions in the federal courts imposed by the Eleventh Amendment. Moreover, the Court's construction of the statutory term "persons" to exclude state officials *acting* in their official capacities cannot be limited to use of the statute to commence civil rights actions in state courts and must be applied with equal effect to civil rights actions commenced in the federal courts.

It is equally clear from the Court's use of the term "acting in their official capacities," rather than "sued in their official capacities," that the Court has adopted the position taken by a number of federal courts prior to *Will* that the Eleventh Amendment precludes the maintenance of a damage action against a state official under 42 U.S.C. §1983 where the alleged misconduct is based upon acts taken within the performance and scope of the official's duties, even though the plaintiff has alleged that the action is against the official in his "personal capacity." *Kolar v. County of Sangamon,* 756 F.2d 564, 568 (7th Cir. 1985); *Beehler v. Jeffes,* 664 F.Supp. 931, 943 n. 20 (M.D. Pa. 1986); *Lewis v. Kelchner,* 658 F.Supp. 358, 361-62 (M.D. Pa. 1986).[7] In other words, it is the action itself which has been taken that is important to the determination whether an action is against the individual in his "official" or "personal" capacity, not the plaintiff's characterization of that capacity.

That this is the effect of the Court's decision in *Will* has already been recognized by the Court of Appeals for the Sixth Circuit in *Rice v. Ohio Dept. of Transportation,* 887 F.2d 716 (6th Cir. 1989). *Rice* involved an action under 42 U.S.C. §1983 by a state employee against his departmental employer, the State Department of Transportation, and the director and

7. See also Rodriguez v. James, 823 F.2d 8 (2d Cir. 1987); Jones v. Smith, 784 F.2d 149 (2d Cir. 1986), which dealt with the question from a slightly different approach by considering a suit to have been brought against a state official in his official capacity, notwithstanding the averments of "personal" capacity, because the alleged unlawful acts were performed pursuant to a state policy. But see, e.g., Farid v. Smith, 850 F.2d 917 (2d Cir. 1988), which relied solely on the allegations of the complaint in determining whether or not a suit was an official or personal capacity action.

deputy director thereof, for damages incurred as a result of plaintiff's being passed over for promotion for alleged improper reasons. In affirming the grant of summary judgment in favor of defendants, the Sixth Circuit held that the state officials, having *acted* in their official capacities in connection with plaintiff's promotion, were not "persons" subject to liability under 42 U.S.C. §1983, notwithstanding plaintiff's allegation of "personal capacity"[8] (887 F.2d at 718-19):

> "Insofar as the director and deputy director were acting in their official capacities, it is now clear that they, like the state itself, were not 'persons' within the meaning of §1983 [quoting *Will*] . . . .
>
> Although the complaint filed by Mr. Rice alleges at one point that the individual defendants were acting both 'in their official and personal capacities' the record does not suggest in any way that the defendants' actions were somehow unofficial. *The capacity in which the individual defendants were in fact acting is what matters, not the capacity in which they were sued;* congressional intent is not to be circumvented Will says 'by a mere pleading device' .... (Emphasis added.)

There is no question in the instant matter that Hafer was acting in her official capacity in discharging the respondents.

8. See also Cowan v. University of Louisville School of Medicine, 900 F.2d 936 (6th Cir. 1990) (action by former medical student against state medical school officials for alleged wrongful dismissal); AFSCME v. Tristano, 898 F.2d 1302 (7th Cir. 1990)(action by state employees against state officials for implementing an employee drug abuse program under color of state authority). But see, Stem v. Ahearn, 908 F.2d 1 (5th Cir. 1990)(action by father against state child protective services workers for alleged wrongful initiation of child molestation charges); Dube v. State University of N.Y., 900 F.2d 587 (2d Cir. 1990)(action by professor against state university officials for alleged wrongful denial of tenure); Santiago v. Lane, 894 F.2d 218 (7th Cir. 1990)(action by prisoner against state prison officials arising out of attacks on him by other prisoners); Wells v.Brown, 891 F.2d 591 (6th Cir. 1990)(action by prisoners against state prison officials for alleged wrongful transfer within prison system); Nix v. Norman, 879 F.2d 429 (8th Cir. 1989)(action by state employee against director of state agency for alleged wrongful discharge).

The Court of Appeals expressly acknowledged "Hafer, the head of the Department . . . is vested under state law with authority to hire and fire employees in the Department. . . ." (A-17 n 8). A fuller discussion of the nature of petitioner's acts is set forth in the opinion of the District Court (A-40):

> Hafer's removal of plaintiffs from their positions occurred in her role as Auditor General, a constitutional officer under the Pennsylvania Constitution. Pa. Const. art. IV, §18. Although Hafer, as Auditor General, directed the firings, plaintiffs were employees of the Commonwealth, not of Hafer. Their grievances are directed against the impact of the Commonwealth's termination of their employment. *Hafer's power to cause the terminations derived solely from her authority as a state official. Had Hafer been acting in a personal capacity, she would not have been empowered to effectuate the discharges.* . . . If Hafer had not been elected, or if she had not fired plaintiffs, there would not have been a basis for these §1983 causes of action. (Emphasis added; footnote omitted).

The Court of Appeal's reliance upon the allegations of six of the sixteen respondents that they are suing Hafer in her "personal", rather than "official" capacity[9] and refusal to accept the plain language of this Court is based upon an analysis that ali acts by a state official "under color of state law" are within the authority of the official's position and the official is subject to liability under 42 U.S.C. §1983 for abuse of that authority (A-17). The defect in this reasoning is that it fails to recognize a distinction between acts of state officials under color of state law which are *outside* of the official's authority or which are not essential to the operation of the state government, and acts of state officials which are both *within the official's authority and necessary to the performance of the State's governmental functions,* such as the hiring and firing of employees. These latter

9. Contrary to the admonition of Will that the immunity of a state official from liability for damages for acts performed in their official capacity should not be circumvented by a mere pleading device.

acts are simply acts of the State which are not subject to damage liability under 42 U.S.C. §1983 by reason of the Eleventh Amendment, as well as this Court's interpretation of that statute in *Will.*

In all events, this Court should review the Court of Appeals's apparent disregard of the express language in *Will* and resolve the conflict in the decisions of the Courts of Appeal which now exist with regard to the determination whether a civil rights damage suit is an official or personal capacity action.

II. The Decision of the Court of Appeals That Petitioner Is Subject to Liability for Damages Under 42 U.S.C. §1983 for Exercising Her Responsibility Under State Law To Hire and Fire Employees of the Department of Auditor General Presents an Important Question of Federal Law Which Should Be Settled by This Court.

The Court's decision that petitioner is liable for damages for exercising her official duties in hiring and discharging employees is not only contrary to *Will,* it also contravenes one of the principal purposes of the Eleventh Amendment, *i.e.,* to preserve the sovereignty of the States by restricting the exercise of federal judicial power over the States and state officials. *Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare,* 411 U.S. 279, 287, 293-94, 93 S.Ct. 1614, 1619, 1622-23 (1973) (Marshall, J., Concurring). These considerations of federalism are particularly critical in matters, such as the instant one, arising out of acts taken in the operation of the State's governmental affairs. Certainly the hiring and firing of employees is an integral part of the operation of a state government and that function can only be performed by the elected and appointed state officials responsible for those functions.

An exception to the proscription of the Eleventh Amendment permitting imposition of personal damage liability against state officials for exercising, on behalf of the State, their official functions in this respect would have a chilling effect upon their good faith efforts to maintain the high standards of employment

practices necessary for efficient management and would interfere with the operation of the state governments.

At the very least, the decision of the Court of Appeals involves an important issue as to the extent of state officials' immunity from federal damage actions in general and as applied to a suit arising out of the firing of employees in particular which should be resolved by this Court.

CONCLUSION

For the reasons specified above, a writ of certiorari should be issued to the United States Court of Appeals for the Third Circuit in the within matter.

Respectfully submitted,

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APPENDIX

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Filed August 21, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 89-1924

JAMES C. MELO, JR.
LOUISE JURIK
DONALD RUGGERIO
KAROL DANOWITZ
JAMES DICOSIMO
LUCILLE RUSSELL
WALTER W. SPEELMAN
JOHN WEIKEL,

Appellants

v.

BARBARA HAFER and JAMES J. WEST

NO. 89-1925

CARL GURLEY
W. GERARD BEST
MICHAEL BRENNAN
MARGARET CASPER
ELIZABETH BUCHMILLER
DANIEL CLEMSON
MARY FAGER
GEORGE A. FRANKLIN, JR.

Appellants

v.

BARBARA HAFER

Appeals from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Nos. 89-2935 & 89-2685)

Argued March 16, 1990

Before: SLOVITER, BECKER and STAPLETON,
Circuit Judges

(Filed: August 21, 1990)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

I.

Introduction

This is an appeal from the district court's dismissal of two civil rights actions. In the action with Carl Gurley as the lead plaintiff, eight terminated employees assert a claim under 42 U.S.C. § 1983 alleging that their discharge by Barbara Hafer, the Auditor General of Pennsylvania, was political and therefore violated their due process and First Amendment rights. In the action with James C. Melo as the lead plaintiff, eight other terminated employees, who similarly allege a violation of their civil rights by Hafer, further allege that Hafer and James West, the acting United States Attorney for the Middle District of Pennsylvania, conspired to deprive them of their civil rights. The Melo plaintiffs also assert state law claims against West.

This appeal requires us to consider whether a claim for monetary relief brought under 42 U.S.C. § 1983 may be maintained against a state official in her individual capacity, whether a claim under the same statute may be maintained against a

federal official when he is alleged to have conspired with a candidate for state office, and whether a scope of employment certification issued by the government in a claim brought under the Federal Tort Claims Act is reviewable.

II.

Facts and Procedural History

The eight plaintiffs whose complaints were consolidated into the Melo action allege that they were employed in various capacities through January 1989 in the Pennsylvania Auditor General's Office, during which time they had compiled satisfactory work records. The complaints allege that sometime after John Kerr, a former employee in the Auditor General's Office, admitted that he received payments to influence either hiring or promotion decisions for 21 employees in the Auditor General's Office, acting United States Attorney West provided a list of the 21 employees to Donald Bailey, the then-Auditor General, in a confidential letter dated on or about January 21, 1988. The letter stated that "[w]e can express no opinion on whether these listed individuals knew of the purchase of their job" and it contained the request "that you keep these names strictly confidential, not use them for any type of media disclosures other than necessary to appropriate administrative proceedings, and make them available only to your most trusted employees on a need-to-know basis." Melo App. at 11. Bailey subsequently conducted an investigation of the 21 employees through his Chief Counsel, James L. McAneny, and McAneny concluded that the Melo plaintiffs committed no wrongdoing nor were they aware of any wrongdoing committed on their behalf.

On or about April 30, 1988, Hafer was nominated as the Republican candidate for Auditor General and Bailey, the incumbent, was nominated as the Democratic candidate. The complaints allege that the Melo plaintiffs were registered Democrats and West was a registered Republican. They allege that during the election campaign between Hafer and Bailey, West provided Hafer with a copy of the letter he sent to Bailey and advised Hafer that the 21 employees on the list "bought their jobs"; that West was "motivated by a desire to assist [Hafer] in the November, 1988 election and to create and/or foster a campaign issue that favored Ms. Hafer"; and that West provided the list with "a knowledge, understanding and expectation that . . . Ms. Hafer, if elected, would fire all of the people on the list." Melo App. at 13. Hafer allegedly stated on numerous occasions during the campaign that she received the "jobs-bought" list from West and that, if elected, she would fire all employees on the list.

Hafer was elected as Auditor General in November 1988. According to the complaints, on February 1, 1989, Hafer, without conducting any additional investigation to determine the alleged involvement of the Melo plaintiffs in the job-buying scheme, fired 18 employees whose names appeared on the "jobs bought" list, including all eight Melo plaintiffs. In her letters terminating the Melo plaintiffs' employment, Hafer stated that the dismissal was "necessary based on information gathered by my office as well as through cooperation with other governmental agencies as a result of an investigation of your involvement in a job buying and/or a job promotion scheme in the Auditor General's Office." Melo App. at 14. The Melo plaintiffs allege that Hafer did not follow the

provisions in the Auditor General's Policy and Procedure Manual, in effect since on or about January 1986, which includes procedural protections and a "just cause" requirement for dismissals.

The complaints also allege that an article in the February 2, 1989 edition of the Patriot-Capital News quoted both Hafer, as stating that she was firing 18 employees who had paid "up to $5,000 each for their jobs under a previous administration," and West, as stating that "he appreciated Ms. Hafer's definitive action in firing the eighteen employees."

The factual allegations and legal claims against Hafer alleged by the Gurley plaintiffs are similar to those made by the Melo plaintiffs. The Gurley plaintiffs allege that they had been continuously employed at the Auditor General's Office in various capacities until February 21, 1989 and had performed their work satisfactorily; that all but one of them were registered Democrats; that all had been supporters of Bailey in the November 1988 election for Auditor General; and that on February 21, 1989, Hafer discharged them without explanation. Unlike the Melo plaintiffs, they have not sued West and make no allegations as to him.

The claims made by the plaintiffs under 42 U.S.C. § 1983 are that their firing by Hafer deprived them of their right to procedural and substantive due process and interfered with their First Amendment freedom of political association. The Melo plaintiffs also allege that Hafer and West engaged in a conspiracy to deprive them of due process and equal protection of the law, and they include the state law claims against West of defamation and interference with contractual relations. Each Melo plaintiff requests $2 million

in compensatory damages, $1.5 million in punitive damages, and reasonable attorneys' fees stemming from the alleged violations of their civil rights. They do not request any form of injunctive relief. Each Gurley plaintiff requests $500,000 in compensatory damages and $500,000 in punitive damages. Six of the Gurley plaintiffs also request reinstatement without back pay.

The procedural sequence of events is relevant to an understanding of the nature of the district court's disposition. The complaints were filed in April and May of 1989. Hafer filed her answers on June 14, 1989.[1] On July 6, 1989, the district court ordered both the Melo and the Gurley plaintiffs to submit joint discovery schedules by July 12, 1989, not to extend beyond September 28, 1989. However, on July 14, 1989, the court deferred the filing of a joint discovery schedule and ordered Hafer to submit her motion for summary judgment by August 9, 1989. The court consolidated the actions on July 18. West moved to stay discovery in the Melo actions on July 20, but the district court never acted on this motion.

On July 28, 1989, West filed a motion in the Melo action to dismiss or, in the alternative, for summary judgment, contending, *inter alia*, that the Melo plaintiffs' section 1983 claim was barred because they had not alleged facts sufficient to establish a conspiracy between Hafer and West whereby he was acting under color of state law.

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1. On June 27, 1989, the Melo plaintiffs filed a protective action in state court against both Hafer and West incorporating by reference both the federal and state claims in their federal complaint. This action was removed by West to the Eastern District of Pennsylvania under 28 U.S.C. §§ 1441(a) and 1442(a)(1) on July 19, 1989 and consolidated with the Melo action. The Melo plaintiffs filed a motion to remand.

Concurrently, the Director of the Torts Branch of the Department of Justice filed a certification pursuant to 28 U.S.C. § 2679(d)(1), stating that "[o]n the basis of information presently available with respect to the occurrences referred to therein, defendant James J. West at all times relevant was acting within the scope of his employment as an employee of the United States." Melo App. at 195. The government also filed a motion to substitute itself for West on the Melo plaintiffs' state law claims of defamation and contractual interference, again pursuant to 28 U.S.C. § 2679(d)(1), and thereafter to dismiss these claims on the ground that under 28 U.S.C. § 2680(h) the government had not waived its sovereign immunity for claims for defamation and contractual interference.

On August 9, 1989, Hafer filed a consolidated motion for summary judgment against both the Melo and Gurley plaintiffs, contending, *inter alia*, that because she was sued only in her official capacity, the plaintiffs' claims were barred by the Eleventh Amendment, and further contending that the plaintiffs had not stated a claim for conspiracy. The Melo plaintiffs, in response to West's motion for summary judgment or dismissal, argued that the court should allow a continuance of discovery pursuant to Federal Rule of Civil Procedure 56(f), as they had no personal knowledge of what transpired between West and Hafer and would therefore not be able to submit affidavits based on the "personal knowledge" of the affiants in order to oppose the motion for summary judgment. Attached to the response was a declaration of James C. Melo to that effect. Again, in their joint response to Hafer's motion for summary judgment, the plaintiffs stated that they did not have adequate time to conduct discovery, although they did not attach the affidavit thereto.

In three separate orders issued on September 28, 1989, the district court granted Hafer's motion for summary judgment, granted the government's motion to substitute itself for West and to dismiss the Melo plaintiffs' state tort claims, and declared as moot West's motion for summary judgment. On the same day the court denied as moot the Melo plaintiffs' motion to remand the case that had been removed from state court. *See* note 1 *supra*.

In a subsequent opinion, the court explained its orders. It held that the plaintiffs' section 1983 claims were barred because they had sued Hafer in her official capacity and that she was not a "person" for purposes of section 1983. The court held that the Melo plaintiffs had not alleged facts showing that the alleged conspiracy between Hafer and West involved some racial or other class-based discriminatory animus, and that therefore their claim based on equal protection, if treated as filed under 42 U.S.C. § 1985(3), failed. Finally, the court held that substitution of the government for West as a defendant to the Melo plaintiffs' state law claims was "necessitated" by the Federal Tort Claims Act in light of the government's certification that West was acting within the scope of his employment, and that those claims were then dismissed because claims against the United States for defamation and contractual interference are expressly excluded under 28 U.S.C. § 2680(h) from the sovereign immunity waiver in the Federal Tort Claims Act.

Both the Melo and the Gurley plaintiffs filed timely notices of appeal, which we have consolidated for our review. We have jurisdiction over the district court's final orders pursuant to 28 U.S.C. § 1291.[2]

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2. Hafer had counterclaimed against the Melo plaintiffs for fraud and conspiracy to commit fraud. Thereafter, the district

III.

Discussion

A.

Standard of Review

At the outset, we must consider what material is appropriately before us. The district court dismissed the action against West but denominated the dispositive order as to Hafer as the grant of summary judgment for Hafer. We have previously held that the label used by a district court, albeit indicative, "is not binding on a Court of Appeals." *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 443 (3d Cir. 1977)(quoting *Tuley v. Heyd*, 482 F.2d 590, 593 (5th Cir. 1973)), *cert. denied*, 434 U.S. 1086 (1978); *see also Rose v. Bartle*, 871 F.2d 331, 340 (3d Cir. 1989). Rather, we must "look to the course of the proceedings and basis for decision in the district court" to determine our standard of review. *Bogosian*, 561 F.2d at 443. If the district court dismisses an action for failure to state a claim on the face of the pleadings on a motion for summary judgment, "a motion so decided is functionally equivalent to a motion to dismiss" and we must review it accordingly. *Id.* at 444; *see also* 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 56.02[3], at 56-33 to 56-34 (2d ed. 1988).

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court adopted the parties' stipulation that Hafer's counterclaims were dismissed without prejudice, with the right to reinstate them at a later date should we reverse the district court's grant of summary judgment. In response to this court's inquiry into the effect on our jurisdiction of the dismissal of the counterclaim without prejudice, Hafer notified this court by letter memorandum that she is abandoning the counterclaim and will not reassert it in the district court in the event that we remand this action for further consideration. Therefore, there is no impediment to the exercise of our appellate jurisdiction at this time.

The plaintiffs contend that we should not consider any discovery materials extraneous to the complaint, as they did not have an opportunity to complete discovery and the district court in fact disposed of the actions based on the face of the complaint. Hafer and West, on the other hand, argue that the plaintiffs had an adequate time to conduct discovery and we should therefore determine whether they are entitled to summary judgment based on the factual record compiled during discovery.

Although the parties have engaged in some discovery and have submitted a variety of documents external to the complaints and their answers, we conclude that we must review the district court's action as one granting a motion to dismiss. The district court's memorandum opinion makes no reference to any of the materials submitted by the parties that were extraneous to the pleadings. It is clear that the court's action rested solely on the failure of the allegations on the face of the complaint to state claims against Hafer and West. *See Bogosian*, 561 F.2d at 444 (district court order should be treated as one dismissing complaint for failure to state a claim because it "excluded everything but the complaint in granting the motions").

Furthermore, the district court's July 14, 1989 order deferred the filing of a joint discovery schedule and ordered Hafer to submit her motion for summary judgment by August 9, 1989. Although this order did not technically prohibit the parties from engaging in further discovery, it could reasonably have deterred further discovery by plaintiffs. Certainly the order demonstrates that

the court was willing to consider the defendants' dispositive motions without a complete factual record developed during a defined discovery period.

The plaintiffs' objections to proceeding with summary judgment were called to the district court's attention by the Melo plaintiffs in their response to West's motion. They sought to comply with Rule 56(f) through the declaration by Melo[3] in which he stated that "neither I nor the other plaintiffs would have personal knowledge of [West and Hafer's communications during the 1988 election]" and requested that the court grant a continuance of discovery until "counsel has had an opportunity to examine under oath the defendants, Mr. Bailey and all other persons who have knowledge of the matter." Melo App. at 111, 112. The district court's failure to rule on the Melo plaintiffs' request for a continuance of discovery,

3. Rule 56(f) provides in pertinent part that

> [s]hould it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Fed. R. Civ. P. 56(f). We express no opinion as to whether the Melo declaration satisfies the Rule 56(f) requirements previously enunciated by this court. *See* Lunderstadt v. Colafella, 885 F.2d 66, 71-72 (3d Cir. 1989) (quoting Dowling v. City of Philadelphia, 855 F.2d 136, 140 (3d Cir. 1988)) ("[A] Rule 56(f) motion must identify with specificity 'what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained.'"). Nor do we express an opinion as to the effect of the failure to attach the Melo declaration to the plaintiffs' response to Hafer's motion for summary judgment.

as well as its failure to rule on West's motion for a protective order, suggests that the court considered the discovery issue irrelevant for purposes of its decision.

Because we treat the district court's orders as granting a motion to dismiss, we must determine whether, in accepting as true the factual allegations in the Melo and Gurley plaintiffs' complaints and all reasonable inferences that can be drawn therefrom, no relief can be granted under any set of facts which could be proved. *See Ransom v. Marrazzo*, 848 F.2d 398, 401 (3d Cir. 1988). For this purpose, we cannot take cognizance of the affidavits of Hafer and West denying many of the plaintiffs' factual allegations.

B.

Individual Capacity Claim Against Hafer

In *Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304, 2312 (1989), the Supreme Court held that neither a state nor state officials sued in their official capacities for money damages are "persons" under section 1983,[4] and that therefore a suit brought in state court against the Michigan Director of State Police was barred. The district

4. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
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> . . .

court, relying on *Will*, concluded that the plaintiffs have sued Hafer only in her official capacity and therefore dismissed their section 1983 claims. On appeal, the plaintiffs contend that the district court erred as a matter of law.

The lines marking the boundaries between official and personal capacity suits have been drawn primarily in the context of Eleventh Amendment cases. That amendment has been interpreted to bar suits for monetary damages by private parties in federal court against a state or against state agencies. *See Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).[5] It also bars a suit against state officials in their official capacity, because the state is the real party in interest inasmuch as the plaintiff seeks recovery from the state treasury. *Graham*, 473 U.S. at 165-166. In a suit against state officials in their "personal" capacity, however, where the plaintiff seeks recovery from the personal assets of the individual, the state is not the real party in interest; the suit is therefore not barred by the Eleventh Amendment. *Id.* at 165-68.

The *Will* Court's conclusion that section 1983 suits could not be brought against state officials in their official capacity followed from the Court's earlier Eleventh Amendment decisions. Although the *Will* Court did not have occasion to consider the status of personal capacity suits against state officials under section 1983, we conclude, borrowing the same Eleventh Amendment jurisprudence that the *Will* Court looked to, that

5. In suits for injunctive or declaratory relief, however, the Eleventh Amendment does not bar an action in which a state official is the named party. Ex Parte Young, 209 U.S. 123 (1908).

because personal capacity suits against state officials are actions against the individual and not the state, state officials sued for damages in their personal capacities are "persons" under section 1983 and therefore subject to suit. *See, e.g., Guiterrez-Rodruiguez v. Cartagena*, 882 F.2d 553, 567 n.10 (1st Cir. 1989).

In determining whether plaintiffs sued Hafer in her personal capacity, official capacity, or both, we first look to the complaints and the "course of proceedings." *Graham*, 473 U.S. at 167 n.14 (quoting *Brandon v. Holt*, 469 U.S. 464, 469 (1985)); *see Gregory v. Chehi*, 843 F.2d 111, 119 (3d Cir. 1988). One of the Gurley complaints, which contains a request by six of the plaintiffs for both reinstatement and damages, explicitly specifies that plaintiffs' request for reinstatement "is asserted against the defendant in her official capacity," but that their monetary claims against Hafer "are asserted against the defendant in her personal capacity."

The *Will* opinion supports maintenance of a section 1983 claim against a state official for reinstatement. The Court, relying again on the Eleventh Amendment, stated that "a State official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Will*, 109 S. Ct. at 2311 n.10 (quoting *Graham*, 473 U.S. at 167 n.14). It follows that the district court erred insofar as it dismissed the Gurley plaintiffs' claim for reinstatement against Hafer.[6]

6. There have been some references to arbitration proceedings initiated by plaintiffs which culminated in orders directing their reinstatement. Such awards are not relevant to the issues on appeal.

As we noted above, these Gurley plaintiffs were explicit that their monetary claims were asserted against Hafer in her individual capacity. The remaining Gurley plaintiffs and the Melo plaintiffs, although not as explicit, signified a similar intent because the captions in the complaints only list "Barbara Hafer," and not the Commonwealth of Pennsylvania, as a defendant, and only request damages from Hafer and not from the state. It appears that Hafer understood that plaintiffs sought to sue her in her personal capacity because she raised the defense of qualified immunity throughout the course of these proceedings, a defense available only for governmental officials when they are sued in their personal, and not in their official, capacity. *See Graham*, 473 U.S. at 166-67; *Conner v. Reinhard*, 847 F.2d 384, 394 n.8 (7th Cir.), *cert. denied*, 109 S. Ct. 147 (1988); *Melton v. City of Oklahoma City*, 879 F.2d 706, 727 n. 32 (10th Cir.), *reh'g granted in part on other grounds*, 888 F.2d 724 (10th Cir. 1989); *Lundgren v. McDaniel*, 814 F.2d 600, 604 (11th Cir. 1987).[7] Moreover, once plaintiffs explained in the district court that they sued Hafer for damages in her individual capacity, they should have been given leave to amend to so assert with specificity, if there was any remaining ambiguity about that issue.

7. A defendant being sued in his or her personal capacity should be given adequate notice that his or her personal assets are at stake. Two courts of appeals apparently require the complaint to specifically identify the capacity in which a defendant is being sued. *See* Wells v. Brown, 891 F.2d 591, 593 (6th Cir. 1989); Nix v. Norman, 879 F.2d 429, 431 (8th Cir. 1989). Our court has taken a more flexible approach, *see* Gregory v. Chehi, 843 F.2d at 119-20 (court "must interpret the pleading"); *see also Graham*, 473 U.S. at 167 n.14. It is obviously preferable for the plaintiff to be specific in the first instance to avoid any ambiguity.

The district court held that the plaintiffs only sued Hafer in her official capacity, notwithstanding their protestations to the contrary, because Hafer would not have been empowered to effectuate the removal of plaintiffs from their positions had she been acting in her personal capacity rather than in her role as Auditor General. However, the fact that Hafer's position as Auditor General cloaked her with the authority to fire the plaintiffs merely supports the undisputed proposition that she acted under color of state law in firing the plaintiffs, a prerequisite to a successful section 1983 suit. *See Robb v. City of Philadelphia*, 733 F.2d 286, 290 (3d Cir. 1984).[8] It does not follow that every time a public official acts under color of state law, the suit must of necessity be one against the official in his or her official capacity. *See Graham*, 473 U.S. at 166 (to establish

8. The "under color of state law" requirement, which is identical to the "state action" requirement of the Fourteenth Amendment, requires a determination of "whether there is a sufficiently close nexus between the State and the challenged action." Johnson v. Orr, 780 F.2d 386, 390 (3d Cir.) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)), *cert. denied*, 479 U.S. 828 (1986). There is no question that Hafer, the head of the Department of Auditor General, *see*, 71 Pa. Cons. Stat § 66 (Supp. 1990), is vested under state law with the authority to hire and fire employees in the Department, thereby satisfying the "under color of state law requirement." *See, e.g.*, 71 Pa. Cons. Stat. § 66 (Supp. 1990) (Department heads shall "exercise and perform the duties by law vested in and imposed upon the department"). The plaintiffs' allegation that Hafer misused her power in firing them does not deprive her actions of the imprimatur of state authority. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 929 (1982) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)) ("[M]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of state law.").

personal liability under section 1983 "*it is enough* to show that the official, acting under color of state law, caused the deprivation of a federal right")(emphasis added).

We reject Hafer's suggestion that a state official can be sued in her personal capacity only if the allegedly unconstitutional actions were not taken in her official capacity. The Supreme Court cases expressly recognize that individual capacity suits may be brought against government officials who acted under color of state law. *See, e.g., Brandon v. Holt*, 469 U.S. 464, 472-73 (1985); *Owen v. City of Independence*, 445 U.S. 622, 637-38 (1980). In fact, underlying each of the cases considering the availability of a qualified immunity defense to a claim for damages against the state official was an individual capacity claim. *See, e.g., Malley v. Briggs*, 475 U.S. 335 (1986) (suit by arrestee against state trooper); *Davis v. Scherer*, 468 U.S. 183 (1984) (suit by employee against official of state highway department); *Tower v. Glover*, 467 U.S. 914 (1984) (suit by clients against public defenders who allegedly conspired with state officials); *Procunier v. Navarette*, 434 U.S. 555 (1978) (suit by prisoner against state prison officials); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (suit by former prisoner against state prosecuting attorney).

Hafer argues that because she has final policymaking authority over hiring and firing in the Auditor General's Department, her actions leading to the firing of the plaintiffs, even if in violation of a "just cause" dismissal policy followed by previous Auditor Generals, constitutes a new state policy and therefore precludes suit against her in her personal capacity. The Second Circuit, in a persuasive opinion, has rejected a similar argument.

In *Farid v. Smith*, 850 F.2d 917 (2d Cir. 1988), an inmate filed a civil rights action against the superintendent of the correctional facility for improperly depriving him of access to certain personal materials. The court held that although the Eleventh Amendment barred suit for damages against the superintendent in his official capacity, it did not bar the inmate from pursuing the action against the superintendent in his personal capacity, even if he was following state policy when committing such acts. *Id.* at 921. *A fortiori*, a state official who herself is responsible for an unconstitutional policy would be personally liable, unless of course she is ultimately successful in her qualified immunity claim. However, disposition on qualified immunity grounds is far different from a disposition on failure to state a claim, which is what the district court did here.

In short, we hold that a section 1983 claim for reinstatement may be maintained against Hafer in her official capacity, that a damage claim under section 1983 alleging civil rights violations may be maintained against Hafer in her individual capacity, that the allegations in the complaints adequately put her on notice of that claim, and that such a claim is not barred by the Eleventh Amendment. Just as the district court erred in dismissing the reinstatement claims because Hafer is a "person" for injunctive relief, so also the district court erred in dismissing the plaintiffs' section 1983 damage claims against Hafer individually because she is a "person" in that capacity[9].

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9. Hafer contends on appeal that even if we were to hold that she is being sued in her personal capacity, we should nevertheless affirm the district court's dismissal of the action, as the plaintiffs' complaints fail to state claims under either

C.

§ 1983 Conspiracy Claim Against West

The section 1983 claim against West asserted by the Melo plaintiffs stands on a different footing than the claim against Hafer. We must consider whether, under the allegations of the complaint, West, who was not a state official, can be viewed to have been acting under color of state law. Because the district court only considered the allegation that West and Hafer conspired to deprive the Melo plaintiffs of their constitutional rights as a claim under 42 U.S.C. § 1985(3),[10] it did not reach this issue. A fair reading of the complaint shows that plaintiffs seek to assert a section 1983 claim, and West does not contend otherwise.

Maintenance of a section 1983 claim requires a showing that the defendant acted under color of state law, but the Supreme Court has held that private parties acting in a conspiracy with a state official to deprive others of constitutional rights are also acting "under color" of state law. *See Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970); *United States v. Price*, 383 U.S. 787, 794 (1966).[11]

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the due process clause or the First Amendment. In light of the fact that the district court did not consider these issues in the first instance, we decline to reach them on appeal.

10. The court dismissed the claim under 42 U.S.C. § 1985(3) on the ground that plaintiffs failed to allege any racial or class-based animus, as required for such a claim. *See* Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). The Melo plaintiffs do not challenge this ruling on appeal.

11. For this purpose we assume, without deciding, that the complaint alleges the prerequisites of a civil conspiracy. *See* Hampton v. Hanrahan, 600 F.2d 600, 620-21 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980).

Consequently, such private parties can be subject to liability under section 1983. *See Adickes*, 398 U.S. at 152. It follows that federal employees who conspire with state officials to violate someone's constitutional rights are treated as acting under color of state law. *See Hampton v. Hanrahan*, 600 F.2d 600, 623 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980).[12]

The Melo complaint alleges that West transmitted the "jobs bought" list to Hafer when she was a candidate "with a knowledge, understanding and expectation that he would be creating a campaign issue favorable to Ms. Hafer and that Ms. Hafer, if elected, would fire all the people on the list." Melo App. at 13. Assuming *arguendo* that the alleged working relationship between Hafer and West during the fall 1988 campaign constitutes "concerted" or "joint" action sufficient to transmute West, a private actor, into one acting under color of state law, *see Robb v. City of Philadelphia*, 733 F.2d 286, 291-92 (3d Cir. 1984); *Cruz v. Donnelly*, 727 F.2d 79, 82 (3d Cir. 1984), it is insufficient in this case because Hafer was not a state actor at the time of the alleged concerted and conspiratorial conduct.[13] We note

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12. We therefore reject West's argument that private parties can be viewed as acting under color of state law only when state or municipal officials substituted the judgment of private parties for their own judgment. Although such a showing may be a basis for finding non-state officials to have been acting under color of state law, *see* Robb v. City of Philadelphia, 733 F.2d 286, 292 (3d Cir. 1984), it is not the only one. See note 13 *infra*.

13. We focus on the alleged conspiracy because the Melo complaint provides no allegations which could satisfy the other bases for holding a private actor to possible liability under section 1983 discussed in National Collegiate Athletic Assoc. v. Tarkanian, 109 S. Ct. 454, 462 (1988) (state creation

that the complaint does not allege that Hafer and West conspired at any time after Hafer took office.

It is true that conspirators can be held liable for subsequent acts taken pursuant to a conspiracy, *see Hampton*, 600 F.2d at 621, and that the Melo plaintiffs have alleged that their firing after Hafer became a state official was "in the course of, in furtherance of and was the culmination of the aforesaid conspiracy." Melo App. at 18. However adequate these allegations might be, if proven, to impose liability under civil conspiracy law generally for acts subsequent to the formation of the conspiracy, they do not supply the missing link of action under color of state law.

When a private party has been held to be acting under color of state law, it has always been because of action in conjunction with an official who was then a state actor. *See, e.g., Adickes*, 398 U.S. at 149-52; *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941-42 (1982); *United Steelworkers of America v. Phelps Dodge*, 865 F.2d 1539, 1546-47 (9th Cir.) (en banc), *cert. denied*, 110 S. Ct. 51 (1989); *Robb*, 733 F.2d at 291-92. It is the presence of that state actor that clothes the private party with the "under color of state law" vestment. *See Adickes*, 398 U.S. at 152 ("'Private persons, jointly engaged *with state officials* in the prohibited action, are acting "under color" of law for purposes of the statute.'") (quoting *Price*, 383 U.S. at 794 (1966)) (emphasis added); *Lugar*, 457 U.S. at 941 ("private party's joint participation *with state officials* in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment")

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of legal framework governing defendant's conduct, delegation of authority to defendant, and knowing acceptance of benefits derived from the defendant's conduct).

(emphasis added). When neither of the parties who allegedly conspired is a state official, there is no state actor to supply even a colorable basis for investing the private actor with a state mantle, even if one of the parties later becomes a state official. Plaintiffs have cited no case for such a proposition, and we see no reason to stretch the law so far. It follows that the Melo complaint failed to state a section 1983 claim against West, and the court did not err in dismissing that claim.

D.

State Law Claims

We turn finally to the dismissal of the state law claims. While the Melo action against West containing both federal and state law claims was pending in the district court, the government filed a scope of employment certification and motion to substitute itself for West. In doing so, the government followed the procedure established by the Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELRTCA), which amended the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2670-2680 (1988).

FELRTCA was passed in response to *Westfall v. Erwin*, 484 U.S. 292 (1988), which held that a federal employee is immune only if s/he was acting within his/her scope of employment *and* was exercising governmental discretion. The primary purpose of FELRTCA was "to return Federal employees to the status they held prior to the *Westfall* decision," that is, a status of absolute immunity for activities within their scope of employment. *See* H.R. Rep. No. 100-700, 100th Cong., 2d sess., *reprinted in* 1988 U.S. Code Cong. & Admin. News 5945, 5947 [hereinafter H.R. Rep. No. 100-700]. To accomplish that mission,

FELRTCA established an exclusive remedy against the United States for suits based on certain negligent or wrongful acts of federal employees acting within the scope of their employment, 28 U.S.C. § 2679(b)(1) (1988), and also added a statutory procedure for certification by the Attorney General to effect a substitution of the United States for its employees in cases pending in federal courts.

The relevant provision states that:

> [u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(1) (1988).

The district court granted the United States' motion for substitution, explaining that because the government certified that West had acted within the scope of his employment,[14] the substitution of the government for West was "necessitated." The court then granted the United States' motion to dismiss the state law claims of defamation and contractual interference because the FTCA's waiver of tort immunity for damages "caused by the negligent or wrongful act or omission of any employee" of the federal

14. The United States Attorney General has delegated this certification authority to United States Attorneys in consultation with the Department of Justice. *See* 28 U.S.C. § 510 (1988); 28 C.F.R. § 15.3(a) (1989).

government "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b)(1988), does not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h) (1988).

Although the district court stated that plaintiffs do not contest that West was acting within the scope of his employment when he allegedly performed the acts complained of, plaintiffs do in fact contest the accuracy of the scope of employment certification. We must thus consider whether the government's certification under 28 U.S.C. § 2679(d)(1)[15] is binding for purposes of substitution of the government, as the government argued in the district court and the district court held, or whether such a certification is subject to judicial review. The courts have divided on this issue. *Compare Nasuti v. Scannell*, Nos. 89-1830, 89-1831, 89-2001, slip op. at 31 (1st Cir. June 29, 1990) (judicial review of scope certification permitted); *Arbour v. Jenkins*, 903 F.2d 416, 421 (6th Cir. 1990) (same); *Gogek v. Brown University*, 729 F. Supp. 926, 933 (D.R.I. 1990) (same); *Baggio*

15. The plaintiffs do not suggest that this section does not apply to a state law claim pendent to a federal claim filed initially in federal court. The plain statutory language covers this situation. We note that the government's certification of scope of employment was filed pursuant to 28 U.S.C. § 2679(d)(1), for purposes of substituting the United States for West in the federal action, and not pursuant to 28 U.S.C. § 2679(d)(2), to remove the state court action. West, however, had removed the action pursuant to other provisions of the United States Code.

v. Lombardi, 726 F. Supp. 922, 925 (E.D.N.Y. 1989); *Martin v. Merriday*, 706 F. Supp. 42, 44-45 (N.D.Ga. 1989) (same); *with S.J. and W. Ranch, Inc. v. Lehtinen*, 717 F. Supp. 824, 826-27 (S.D. Fla. 1989) (no judicial review of scope certification); *Mitchell v. United States*, 709 F. Supp. 767, 768 & n.4 (W.D. Tex. 1989) (same), *rev'd on other ground*, 896 F.2d 128 (5th Cir. 1990);[16] *see also Mitchell v. Carlson*, 896 F.2d 128, 134, 136 (5th Cir. 1990) (suggesting no judicial review of scope certification); *Aviles v. Lutz*, 887 F.2d 1046, 1049 (10th Cir. 1989) (same).

While this case was on appeal, the United States changed its position on this issue. The government now states that although the government's determination is entitled to deference, "the district court may review the Attorney General's certification that the challenged acts occurred within the scope of employment of a federal official."[17] In light of the division among the courts on this issue, we will analyze the issue *de novo* before establishing this court's position.

16. Two other courts of appeals, although not directly addressing this issue, have suggested that plaintiffs may seek judicial review of certification. *See* Sowell v. American Cyanamid Co., 888 F.2d 802, 805 (11th Cir. 1989) ("[T]he Department of Justice has determined that [defendant] was acting within the scope of his employment, a determination which is obviously correct in light of the testimony at trial."); Lunsford v. Price, 885 F.2d 236, 238 n.7 (5th Cir. 1989) (noting that plaintiffs did not contest certification that employees' acts were within scope of employment).

17. The relevant portion of the government's letter states:

> At oral argument, the Court . . . asked the undersigned counsel whether Mr. West contended that a determination by a government agency that an employee committed an alleged tort while acting within the scope of his employment was binding and conclusive on that issue and required that the Government be substituted as defendant. Although the Government initially advanced this interpetation of the statute following enactment, upon further inquiry counsel for Mr. West has learned that the Government's current position based on the legislative history of this statute is that the Attorney General's scope of employment determination is binding only for the purpose of the removal of a suit against a federal employee to federal court under 28 U.S.C. § 2679(d)(2). With respect to whether the United States must be substituted as defendant as to tort claims raised against a federal employee, the Government's position is that, although the government's determination is entitled to deference, the district court may review the Attorney General's certification that the challenged acts occurred within the scope of employment of a federal official.

Letter from Barbara L. Herwig and Peter R. Maier, Attorneys, Appellate Staff, Civil Division (March 20, 1990).

We must first look to the language of the statute, *see United States v. James*, 478 U.S. 597, 606 (1986), and in particular to the distinction in the language between sections 2679(d)(1), governing certifications in cases filed initially in federal court, and section 2679(d)(2), authorizing the Attorney General to provide certifications for the purpose of removing actions filed in state court to federal court.[18] The last sentence of section 2679(d)(2) specifically provides that "[t]his

18. Section 2679(d)(2) provides in full that:

> [u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding

certification of the Attorney General shall conclusively establish scope of office or employment *for purposes of removal.*" 28 U.S.C. § 2679(d)(2) (emphasis added). There is no similar language of conclusiveness in section 2679(d)(1). Also, the explicit statement that the binding character of certification applies only "for purposes of removal" suggests that Congress recognized a distinction between use of the certification for removal and its use for purposes of substitution of the government as the defendant in actions filed in federal court. *See Nasuti*, Nos. 89-1830, 89-1831, 89-1001, slip op. at 28-29.

There are significant policy reasons why Congress would choose to give the government an unchallengeable right to have a federal forum for tort suits brought against its employees. Historically, the government has generally preferred to have litigation which it or its employees are defending in the neutral confines of federal courts. For example, a similarly "absolute" right of removal is provided by 28 U.S.C. § 1442(a)(1) whenever a suit against a United States officer is filed in a state court for any act "under color of [federal] office" because, as the Supreme Court has explained, "Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum." *Willingham v. Morgan*, 395 U.S. 402, 407 (1969).

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is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

There is no suggestion in FELRTCA that once the federal forum has been secured, Congress was inclined to make the Attorney General's right to substitute the government for the employee unreviewable. In fact, Congress acknowledged the propriety of having a federal court review the scope of employment issue when the positions of the federal employee and the government conflict. Under 28 U.S.C. § 2679(d)(3)(1988), "[i]n the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment." The same provision insures a federal forum for such a judicial determination.[19] There is no reason why Congress would have provided employees with judicial review of the scope of employment certification decisions while denying a similar review of certification decisions to dissatisfied plaintiffs.

The legislative history of the Act also supports our reading of FELRTCA. In discussing the exclusivity issue, the House Report noted that the Federal Drivers Act, 28 U.S.C. § 2679(b)-(e) (1982) (subsequently amended in 1988), one of the components of the FTCA, provided an exclusive federal remedy when the injuries resulted from the operation of a motor vehicle by a federal employee acting within the scope of his employment. See H.R. 100-700, 1988 U.S. Code Cong. & Admin.

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19. If the employee petition is filed in an action pending in state court, the action may be removed without bond by the Attorney General to the federal court for such a determination, to be remanded if the court determines that the employee was not acting within the scope of employment. 28 U.S.C. § 2679(d)(3).

News at 5948. The Drivers Act contained a provision for a scope of employment certification by the Attorney General for purposes of removal to federal court. Although it did not set forth any scope-of-employment certification procedures for actions filed in federal court, federal courts routinely made a determination as to whether the employee was acting within his or her scope of employment before ruling whether the action could be maintained against the government exclusively. *See, e.g., Cronin v. Hertz Corp.*, 818 F.2d 1064 (2d Cir. 1987); *Borrego v. United States*, 790 F.2d 5 (1st Cir. 1986); *Levin v. Taylor*, 464 F.2d 770 (D.C. Cir. 1972).

The extensive discussion in the House Report on the factors relevant to whether an act was within the employee's scope of employment, *see* H.R. Rep. No. 100-700, 1988 U.S. Code Cong. & Admin. News at 5949-50, suggests that Congress intended that the practice of court determination of the issue should be continued. Representative Frank, the sponsor of the Act, confirmed that FELRTCA was meant to ensure continuity, rather than a break, with past practice when he stated at a legislative hearing that "the plaintiff would still have the right to contest the certification if they [sic] thought the Attorney General were certifying without justification." *Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary*, 100th Cong., 2d Sess. 60, 128 (April 14, 1988) (statement of Representative Frank).

Based on the language, structure, and legislative history of FELRTCA, we thus independently conclude that the district court may review the government's certification that the actions which

the Melo plaintiffs allege that West took were within the scope of his employment.

It is therefore evident that we must vacate the district court's dismissal of the state law claims. The dismissals were predicated on the government's status as a defendant, which in turn is dependent on whether West was acting in the scope of employment. On remand, the parties will have an opportunity to address that issue. *See* 28 U.S.C. § 1346(b) (scope of employment determination under the FTCA to be made "in accordance with the law of the place where the act or omission occurred"); *see also Williams v. United States*, 350 U.S. 857 (1955) (per curiam). The district court will also have to decide which factors are relevant to that determination. The briefs of the parties have not discussed that issue.[20]

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20. In light of our holding, we need not reach the question of whether the government, if properly substituted for West, would be able to dismiss the action because of the exception to its waiver of sovereign immunity for claims of defamation and interference with contractual relations under 28 U.S.C. § 2680(h). *Compare Mitchell*, 896 F.2d at 134-36 (plaintiff without remedies if government, as substituted party, is immune); *Aviles*, 887 F.2d at 1049-50 (same); *Sowell*, 888 F.2d at 805-06 (same); Moreno v. Small Business Admin., 877 F.2d 715 (8th Cir. 1989) (same) *with* Smith v. Marshall, 885 F.2d 650, 654-56 (9th Cir. 1989) (plaintiff may proceed against individual employee if substitution of government would lead to dismissal because of government immunity under 28 U.S.C. § 2680(k)), *cert. granted sub nom.* United States v. Smith, 110 S. Ct. 2617 (1990); Newman v. Soballe, 871 F.2d 969, 971-73 (11th Cir. 1989) (same).

It is unclear whether a federal employee who was not acting within the scope of his employment may yet have acted under color of his office insofar as that determination will control whether he is entitled to a federal forum, *see* 28 U.S.C. § 1442(a)(1), and we will not attempt to answer that entirely hypothetical question (in advance of the district

V.

Conclusion

For the foregoing reasons, we will vacate the orders of the district court dismissing the civil rights claims as to Hafer and dismissing the Melo plaintiffs' state law claims as to West, and remand for further proceedings consistent with this opinion. We will affirm the order dismissing the Melo plaintiffs' section 1983 claim against West.

Costs to be awarded to appellants in the Gurley action. In the Melo action, appellants to bear one-third of the costs, Hafer one-third, and West one-third.

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court's ruling on the government's scope of employment certification), the parties not having even briefed this issue. The point is relevant to the motion for remand, on which the district court must rule if it determines that West was not acting within the scope of his employment. Moreover, in view of the many uncertainties and imponderables about the status of the case on remand, we leave to the district court in the first instance the question whether, if the district court determines that West was not acting in the scope of his employment, the state law claims included in the federal action should be dismissed, *see* Tully v. Mott Supermarkets, Inc., 540 F.2d 187 (3d Cir. 1976), because they were pendent to a federal claim against him which has been dismissed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1924

JAMES C. MELO, JR.
LOUISE JURIK
DONAL RUGGERIO
KAROL DANOWITZ
JAMES DICOSIMO
LUCILLE RUSSELL
WALTER W. SPEELMAN
JOHN WEIKEL,

Appellants

v.

BARBARA HAFER and JAMES J. WEST

No. 89-1925

CARL GURLEY
W. GERARD BEST
MICHAEL BRENNAN
MARGARET CASPER
ELIZABETH BUCHMILLER
DANIEL CLEMSON
MARY FAGER
GEORGE A. FRANKLIN, JR.,

Appellants

v.

BARBARA HAFER

SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM, *Chief Judge*, SLOVITER,

BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD and ALITO, *Circuit Judges*

The petition for rehearing filed by Appellee Barbara Hafer in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

Dated: Sep 21, 1990

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES C. MELO, JR., et al.	:	CIVIL ACTION
Plaintiffs,	:	
	:	NO. 89-2935
v.	:	
BARBARA HAFER	:	
and	:	
JAMES J. WEST, ESQUIRE	:	
Defendants.	:	
CARL GURLEY, et al.	:	CIVIL ACTION
Plaintiffs,	:	
	:	NO. 89-2685
v.	:	
BARBARA HAFER	:	
Defendant.	:	

ORDER

And now, this 28th day of Sept., 1989, it is hereby ORDERED and DECREED that Defendant Barbara Hafer's Motion for Summary Judgment is GRANTED and:

(1) Civil Action No. 89-2935 is dismissed with prejudice; and

(2) Civil Action No. 89-2685 is dismissed with prejudice.

Ludwig, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CARL GURLEY, et. al.	:	CIVIL ACTION
v.	:	NO. 89-2685
BARBARA HAFER	:	
.....		
JAMES C. MELO, JR., et. al.	:	CIVIL ACTION NO. 89-2935
v.	:	
BARBARA HAFER and JAMES J. WEST, ESQUIRE	:	
.....		

MEMORANDUM

Ludwig, *J.* October 18, 1989

These are two interrelated § 1983 actions.[1] One of them – the *Gurley* action – is against Barbara Hafer, Auditor General of Pennsylvania. The other – the *Melo* action – is against Barbara Hafer and James J. West, Esquire, the United States Attorney for the Middle District of Pennsylvania. In both, Hafer moves for summary judgment. Fed.R.Civ.P. 56(c). West moved to dismiss the complaint or, in the alternative, for summary judgment. Fed.R.Civ.P. 12(b)(6), 56(c). Thereafter, the United States moved to be substituted for West on the complaint's state law counts and to dismiss for failure to state a claim on which relief could be granted. Fed.R.Civ.P. 12(b)(6).

Orders were entered September 28, 1989 granting Hafer's motion for summary judgment and the motion of the United States to be substituted for West, together with its motion to

1. Jurisdiction is federal question, 28 U.S.C. § 1331 and 42 U.S.C. § 1983. The action against Hafer and West also contains a § 1985 count.

dismiss as to the state counts; and dismissing West's motion as to the federal law counts as moot.

In both actions, the complaints allege that defendant Hafer violated plaintiffs' constitutional rights by firing plaintiffs – 16 in all – from their employment in the Pennsylvania Auditor General's Office.[2] In *Gurley,* she is alleged to have done so because of their Democratic political affiliation and in violation of the Auditor General's established hiring and discharge regulations. In *Melo,* she and West are alleged to have conspired together to cause the firings. Against West, state claims for defamation and interference with contractual relations are also asserted.

According to the *Melo* complaint, West, on January 21, 1988, gave Donald Bailey, the incumbent Auditor General, a list of 21 employees, including plaintiffs, who were suspected of having "bought" their job through political contributions. Amended complaint at 6. West, a Republican, also provided Hafer, then the Republican candidate for Auditor General, with a copy of the list after an internal investigation by Bailey's office had cleared plaintiffs of any wrongdoing.

Subsequently, Hafer stated during the election campaign that if elected, based on the information received from West, she would fire those named on the list. *Id.* On January 16, 1989 Hafer was inaugurated, and on February 1, 1989, she fired 18 employees, including the *Melo* plaintiffs. On February 21, 1989, she fired the *Gurley* plaintiffs, who though not on the list were terminated as part of a managerial reorganization.

The law of suability of governmental officials continues to be evolving. In *Will v. Michigan Department of State Police,* __ U.S.__,__, 109 S.Ct 2304, 2312 __L.Ed.2d __ (1989), it was decided that a § 1983 action in state court did not lie against a State or its officials acting in their official capacity. The reason is that they are not "persons" under 42 U.S.C. § 1983 and, as such, were not intended by Congress to be suable under that

2. By orders of July 17, 1989 the three actions against Hafer alone were consolidated under C.A. No. 89-2685; and the eight actions against Hafer and West were consolidated under C.A. No. 89-2935.

act.[3] "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Will*, __U.S. at __, 109 S.Ct. at 2311. *See also Quern v. Jordan*, 440 U.S. 332, 350, 99 S.Ct. 1139, 1150, 59 L.Ed.2d 358 (1979) (Brennan, J. concurring: "[T]he Court. . . conclude[s], in what is patently dicta, that a State is not a 'person' for the purposes of 42 U.S.C. § 1983"); "[I]n common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it." *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667, 99 S.Ct. 2529, 2537, 61 L.Ed.2d 153 (1979), quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604, 61 S.Ct. 742, 743, 85 L.Ed. 1071 (1941).

However, the distinction between official and individual or personal capacity suits can be elusive. A useful explanation of the dichotomy is set out in *Kentucky v. Graham*, 473 U.S. 159, 167-168, 105 S.Ct. 3099, 3105-3106, 87 L.Ed.2d 114 (1985), reversing the imposition of attorney fees on a State after plaintiff had prevailed against its police commissioner acting in his personal capacity:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." [A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the

3. 42 U.S.C § 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

> official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.
>
> On the merits, to establish) *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. More is required in an official-capacity action, however, for a governmental entity is liable under § 1983 only when the entity itself is a "moving force" behind the deprivation, . . . thus, in an official-capacity suit the entity's "policy or custom" must have played a part in the violation of federal law. When it comes to defenses to liability, an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses such as objectively reasonable reliance on existing law. In an official-capacity action, these defenses are unavailable. The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity *qua* entity, may possess, such as the Eleventh Amendment. While not exhaustive, this list illustrates the basic distinction between personal- and official-capacity actions.

(Citations and footnotes omitted. Emphasis in original.)

No decision appears to have dealt explicitly with whether a discharge from state employment is an official or personal action by the individual ordering the termination. In *Lewis v. Kelchner*, 658 F.Supp. 358 (M.D. Pa. 1986), a former state university employee filed a wrongful discharge suit against the university, its president, and the Pennsylvania State System of Higher Education. Plaintiff sued the university president in both his official and individual capacities. The official capacity suit was held barred by the Eleventh Amendment. Summary judgment was also granted for the university president in his individual capacity since the complaint attacked only the termination of plaintiff's employment with the university. By implication, the discharge was considered to have been official conduct on the university president's part. *Id.* at 361-62.

Hafer's removal of plaintiffs from their positions occurred in her role as Auditor General, a constitutional officer under the Pennsylvania Constitution. Pa. Const. art. IV, § 18. Although Hafer, as Auditor General, directed the firings, plaintiffs were employees of the Commonwealth, not of Hafer. Their grievances are directed against the impact of the Commonwealth's termination of their employment. Hafer's power to cause the terminations derived solely from her authority as a state official. Had Hafer been acting in a personal capacity, she would not have been empowered to effectuate the discharges. Her campaign statements made before she took office, albeit personal conduct, do not provide grounds for § 1983 relief. If Hafer had not been elected, or if she had not fired plaintiffs, there would not have been a basis for these § 1983 causes of action.[4]

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4. The actions against Hafer also implicate state sovereign immunity under the Eleventh Amendment: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." U.S. Const. Amend. XI.

A suit may be barred by the Eleventh Amendment, although the State is not a named defendant. *See. Edelman v. Jordan,* 415 U.S. 651, 663, 94 S.Ct. 1347, 1356, 39 L.Ed.2d 662 (1974). The bar is effective in a damage suit against a state officer where the State itself is the real party in interest. *See id.,* 415 U.S. at 663, 94 S.Ct. at 1356. "[T]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 101, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984).

It has been ruled that Congress did not intend to abrogate state sovereign immunity in passing the Civil Rights Act of 1871, the precursor to § 1983. *See Quern v. Jordan,* 440 U.S. 332, 341, 99 S.Ct. 1139, 1145, 59 L.Ed.2d 358 (1979). A suit in federal court against a state officer based on a § 1983 cause of action therefore remains subject to Eleventh Amendment restrictions. The Court in *Will v. Michigan Department of State Police* noted that although the parameters of the Eleventh Amendment and of § 1983 are separate issues, "in deciphering congressional intent as to the scope of § 1983, the scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of § 1983 that disregards it." *Id.,* 109 S.Ct. at 2309.

A determination of the Eleventh Amendment defense asserted by Hafer is unnecessary. Moreover, much of the constitutional reasoning entailed is incorporated in the statutory construction of *Will* that a state officer acting in an official capacity is not a § 1983 "person." That this holding occurred in a

As to plaintiffs' claims against Hafer and West, a conspiracy to interfere with civil rights may be actionable under 42 U.S.C. § 1985(3):

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

It is established, however, that § 1985(3) is restricted to conspiracies involving some racial or other class-based discriminatory animus. *See Griffin v. Breckenridge,* 403 U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971); *Moire v. Temple University School of Medicine,* 613 F.Supp. 1360, 1366 (E.D. Pa. 1985). As noted in *Griffin:*

> That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others . . . . The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose – by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors . . . The language requiring intent to deprive of *equal* protection or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.

Griffin, supra, 403 U.S. at 102, 91 S.Ct. at 1798. (Emphasis in original.) The *Melo* complaint does not set forth facts to show

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state court action is immaterial to the enforcement of such an action. Parenthetically, whether a State's discharge of an employee be considered from the viewpoint of § 1983 or of the Eleventh Amendment, it is essentially a state matter; the same objectives may be descried.

that plaintiffs are a class protected by the statute. There is no allegation or evidence suggesting the requisite class-based animus for a § 1985 conspiracy claim.[5]

The substitution of the Government for West was necessitated by the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C § 2679(b)(1). An action for injury or loss of property resulting from the negligent or unlawful act of a government employee acting within the scope of his office or employment must be directed exclusively against the United States. 28 U.S.C. § 2679(b)(1). *See Robinson v. Egnor,* 699 F.Supp. 1207, 1214 (E.D. Va. 1988). Any action against the employee arising out of the same subject matter is prohibited. 28 U.S. C. § 2679 (b) (1) .

The Government certified West's conduct in this case to have been within the scope of his employment as United States Attorney, 28 U.S.C. § 2679(d)(1), (d)(2). *See Mackey v Vleck.* No. C88-0287-8, slip op. at 3 (D. Wyo. March 1, 1989). Plaintiffs' response does not contest this point. Under 28 U.S.C. § 2680(h), actions against the United States for defamation and tortious interference with contract rights are expressly excluded from the sovereign immunity waiver. Counts V and VI of the amended complaint were dismissed for failure to state a cognizable claim.[6]

Edmund V. Ludwig, *J.*

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5. It would appear to follow from *Will v. Michigan Department of State Police, supra,* that a state officer acting in an official capacity can not be a "person" under § 1985, the civil rights conspiracy statute, as well as under § 1983.

6. The *Melo* complaint does not allege and there is no contention that West is a *Bivens* defendant. *See* plaintiffs' answer to West's motion to dismiss the complaint, at 7.